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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 71-1553

JOHN J. GILLIGAN, Governor of Ohio, DANA L. STEWART, Adjutant General of Ohio, ROBERT H. CANTERBURY, Assistant Adjutant General,

Petitioners,

—against—

CRAIG MORGAN, THOM DICKERSON, WILLIAM SLOCUM,

Respondents.

WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF OF RESPONDENTS TO *AMICUS CURIAE* BRIEF OF THE UNITED STATES

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Introductory Statement

Following the completion and filing of briefs in this case, the Solicitor General, on request of the Army, sought and was granted leave to file an *amicus curiae* brief in support of petitioners. Because the brief goes into some matters not dealt with in petitioners' briefs, respondents believe it is appropriate to reply to the new matters discussed in the brief of *amicus curiae*.[1] Due to the lateness of the date, the Clerk has granted permission for this brief to be filed

[1] For the remainder of this brief, the "brief of the United States as Amicus Curiae" will be referred to as "the government's brief" in contradistinction to the state's brief.

in typewritten form. A printed copy will shortly be forthcoming.

Argument

The government's brief devotes a certain amount of space to setting forth the relative roles of the Army and the Ohio National Guard, as separate units in control of training of National Guard members.[2] What is new about the government's brief, however, is the contention, not specifically made by the state, that Article III concepts of ripeness and mootness and related equity concepts of imminence of repetition and injury require the dismissal of this suit.

I.

Definition of Terms

As has been recognized before, terminology in the area of justiciability—which we can loosely define as the issue of appropriateness of the suit for judicial consideration—tends to run together and words defining related but different concepts spill over into each other. See *Baker* v. *Carr*, 369 U.S. 186 (1962). In respondents' main brief, a section devoted to discussion of "standing" dealt with the issue of whether respondents were the proper parties to bring suit. The government's brief uses "standing" to denote a different concept. The claim is that the danger of future injury is too remote and that the case is either "moot", i.e., too far in the past, or "unripe", i.e. the risk lies too hazily in the future. In the hope of maintaining separation of the concepts, this brief will refer to those notions as issues of mootness and ripeness and imminence.

[2] Significantly, the government's brief demonstrates at page 9, that when the National Guard is used in control of civilian disorder it functions as a police force under state control.

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II.

Imminence

The imminence claim of the government is basically that the risk of future injury is "wholly speculative" (Govt.'s Brief, p. 24). They contend that the issue is not what happened in the past but rather what may happen in the future. In a certain sense, the argument is a bit disingenuous. If there had been no incident and injuries in the past and simply the claim was made that the way in which the National Guard functioned created a risk of future injury, we seriously doubt that the government would concede the issue of justiciability. Cf. *Davis* v. *Ichord,* 442 F.2d 1207 (D.C. Cir. 1970).

More fundamentally what makes this case an actual controversy is the past wrongdoing. It is the specific allegations of injuries suffered and acts committed which takes this case out of the realm of speculation and provides the concreteness and adverseness normally necessary for adjudication. Cf. *Lankford* v. *Gelston,* 364 F.2d 197 (4th Cir. 1966).

The best way to analyze the issue of whether, assuming past wrongdoing, there is sufficient imminence is by stages. The first stage is whether the complaint properly alleges the matter. The allegations are that the "actions and operating methods of the Ohio National Guard, together with a continuation of the same rules, procedures and operating methods . . . creates a substantial threat of repetition of similar acts . . . " (Complaint, Para. 11, Appendix p. 6). The only basis for contesting that allegation as a matter of law is the government's contention (Govt.'s Brief, pp. 22-24) that "one incident" is not enough. It is hard to

imagine a sound reason why one incident is not enough if the goal of equity, or even declaratory relief, is to prevent future harm. Assuming proof of wrongdoing and proof that conditions continue, giving credence to a wrongdoer's claim that the wrong hasn't been committed twice is contrary to common sense and defeats the protective role of government.

Moreover, there is ample precedent for relief. *Lankford* v. *Gelston*, 364 F.2d 197 (4th Cir. 1966) (mass search) was certainly "one incident" in the way in which the government uses the concept to describe this case. So too was *Sterling* v. *Constantin*, 287 U.S. 378 (1932).

III.

Mootness

Assuming a good complaint then, the second stage of analysis is whether, since the time of its filing, matters have changed so as to make the claim for relief now moot. Cf. *Hall* v. *Beals*, 396 U.S. 45 (1969). As a purely legal matter, a controversy is moot only if it is incapable of repetition. *United States* v. *W. T. Grant*, 345 U.S. 629 (1953). The other aspect of the issue—whether the conditions have been corrected so as to make an injunction unnecessary—is basically a question of fact. Both the state —in its Suggestion of Mootness—and the government—in its brief—set forth facts which, *if true, might* make *some* of the relief requested unnecessary. The only way to resolve the truth of such claims is by trial. Assumptions like that in the government's brief that everything the Army asserts about its training is a full reflection of reality

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have been proved to be too optimistic in the past.[3] If necessary, respondents believe it can be proved that Ohio National Guard officials have engaged in a series of misrepresentations respecting the nature of the incidents leading to this suit.[4] A related assumption—that the defendants and their agents are all engaged in a good faith effort to change the Ohio National Guard's conduct in civilian disorders—is likewise one which cannot pass unquestioned without some proof. The only certainty is that the fact of change and correction, like the fact of wrongdoing, can only be proved after trial.

IV.

The Relief Sought

An additional assumption in the government's brief is that, if change in the conditions respecting the Ohio National Guard's training is proved, no relief would be warranted. A part of the relief sought, however, relates not to training and weapons but rather to orders. See Brief of Respondents, pp. 4-6. One aspect of that issue is the claim that the Ohio National Guard acted as a military force empowered to suspend rights rather than as a police

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[3] The Pentagon Papers, involved in *New York Times* v. *United States*, 403 U.S. 713 (1971), demonstrate a continuing risk that the executive branch can see deception, half-truth and semantic distinction as legitimate in pursuit of its goals. Another instance is the Army's treatment of obligations of honesty in connection with surveillance data banks. See Report, Army Surveillance of Civilians: A Documentary Analysis, Committee on the Judiciary, U.S. Senate, 92nd Cong., 2nd Sess., 95 et seq. (1972).

[4] The most obvious is the attempt to justify the shooting into a crowd by troops in response to sniper fire. See *e.g.*, Columbus Citizen-Journal, May 5, 1970, p. 1, col. 6.

force. As to that claim, and others, a district court might well conclude that an injunction was not warranted but that a declaratory judgment was most appropriate. Cf. *Abbott Laboratories* v. *Gardner,* 387 U.S. 136 (1967).

V.

"Chilling Effect"

The government's brief attempts to characterize respondent's claim of standing as one ultimately dependent upon the "chilling effect" on exercise of constitutional rights allegation apparently rejected in *Laird* v. *Tatum,* 408 U.S. 1 (1972). Here, however, the claim of past injury rests on concrete past harms which resulted, it is alleged, from specific wrongdoings. To the extent that inhibition of exercise of the right of assembly and public demonstration has pertinence in this case, it has it only insofar as there is an independent legal claim of wrongdoing—actually the several specified in the complaint—and an independent basis for relief—the risk of future shootings, future physical interference with lawful assembly, future beatings and the like. Thus, chilling effect can only be relevant here as an *additional* basis for a district court to grant relief if it found wrongdoing and *other* injury.

So viewed, this case is fundamentally different from *Laird* v. *Tatum,* 408 U.S. 1 (1972). (See the discussion of *Laird* in respondents' brief on p. 26, n.24). As the Court characterized the claim it rejected in *Laird,* it was that governmental conduct otherwise lawful can be made unlawful because it has a "chilling effect." The conduct alleged in this case is unlawful irrespective of any chilling effect because it effects a deprivation of specifically protected constitutional rights.

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Moreover, a related claim made for *Laird* in the government's brief, and apparently for *Orloff* v. *Willoughby*, 345 U.S. 83 (1953), that the military's conduct of its own affairs is not reviewable by a court, is not supported by those cases. Since the Court characterized the army surveillance in *Laird* as not effecting a deprivation of a specific *constitutional right*, it was easy to see the remainder of the claim as essentially one of policy. Similarly, in *Orloff*, the only claim left to be adjudicated was whether the Army ought to commission a particular physician, a claim of policy rather than recognized legal right. What is common to both cases is the absence, or rejection, of the claim that the Army's conduct effected a deprivation of constitutional rights of civilians. It is contrarily true, however, that when it is fairly alleged, or proved, that military conduct effects a deprivation of a constitutional right of a civilian, the case becomes appropriate and necessary for judicial inquiry and redress. See, e.g., *Reid* v. *Covert*, 354 U.S. 1 (1957); *United States ex rel. Toth* v. *Quarles*, 350 U.S. 11 (1956); *Duncan* v. *Kahanamoku*, 327 U.S. 304 (1946). Cf. *O'Callahan* v. *Parker*, 395 U.S. 258 (1969). It would be inconsistent with a fairly solid line of decisions[5] to read *Laird* as holding that despite a claim of deprivation of a specific constitutional right, military conduct could not be examined because of a claim of superior expertise.

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[5] The cases are summarized in *Respondents' Brief*, pp. 31-34 and extensively in the *amicus curiae* brief of the Law Revision Center.

CONCLUSION

For the foregoing reasons, as well as those explored in earlier briefs, it is apparent that the complex issues of justiciability and related doctrines involved in this case can only be resolved after a trial on the merits.

Respectfully submitted,

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